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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

vs.

FRED H. HARMSEN, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

Respondents' brief in opposition to the certiorari petition in this case reflects the same misapprehension of the seventh amendment question presented as did the opinion of the Ninth Circuit below. No issue of state law is involved.

Petitioner's argument is really quite simple. The jury found petitioner liable on Count IX, for conspiracy to abuse control, and on other counts. In its special verdicts (App. to Cert. Pet. at 33a, 38a), the jury specifically found that petitioner participated in the conspiracy only during a limited period of time, and, accordingly, *awarded damages against petitioner on Count IX in an amount far less than the total amount of damages suffered by all shareholders.* Yet the district court, in attempting to comply with the requirement of Fed. R. Civ. P. 23(c)(3) that the judgment "specify or describe those . . . whom the court finds to be members of the class," described a class comprising all persons to whom petitioner *could have been* found liable

under state law (i.e., all shareholders as of the date the bank failed), rather than a class comprising those to whom the jury *actually* found petitioner liable (those who acquired their shares during the period the jury found petitioner to have participated in the conspiracy).

Petitioner does not now quibble with the jury instruction to the effect that petitioner *could* be found liable to all shareholders, or with the Ninth Circuit's assertion that, as an abstract proposition, California law permits such expansive recovery. Rather, petitioner's argument derives from the obvious fact that the jury did not in fact impose liability on petitioner except as to those class members who acquired their shares during the period petitioner was found to have participated in the conspiracy. Thus the district court's specification of the class has the effect of expanding petitioner's liability as found by the jury.

One need not "dissect" the jury verdict to understand the correctness of petitioner's position. Rather, it requires a willful ignorance of the specific and detailed facts found by the jury to conclude that any and all class members may claim against the funds paid by petitioner, as the district court's judgment allows. It is a simple and obvious fact that the district court's specification of the class pursuant to Rule 23(c)(3) permits recovery against petitioner by class members who whom the jury clearly and unequivocally found her not liable. Thus the district court's attempted compliance with Rule 23(c)(3), affirmed by the Ninth Circuit, has the effect of redetermining facts found by the jury, in violation of the seventh amendment.

II

The second question presented in the petition for certiorari concerns the application of the 1982 amendment to 18 U.S.C. § 1961 to a judgment entered before the effective date of the amendment. That respondents make no effort to defend the Ninth Circuit's ruling on this issue on the

merits gives rise to an inference regarding the inherent difficulty of that task. Instead, respondents suggest only that the question is not sufficiently important to justify review by this Court. The suggestion is wrong, for two reasons.

First, as suggested in the petition and uncontradicted by respondents, the issue has been and continues to be litigated with appalling frequency; indeed, the dates of the underlying judgments at issue in the appellate cases decided to date suggest that the volume of litigation on this issue will increase, not decrease. A ruling on this issue by this Court would put a halt to the enormous drain on the admittedly scarce resources of the district courts and courts of appeals.

Second, the mere existence of a split of authority in the circuits undercuts the express congressional purpose of achieving uniformity in the interest rates applied to federal court judgments. Resolution of this split of authority is necessary to effectuate that intent.

CONCLUSION

For the reasons set forth in her petition, her supplemental brief, and this reply, petitioner respectfully prays that a writ of certiorari issue to review and correct the rulings of the Ninth Circuit.

Respectfully submitted,

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